

Docket No.: 02-0441
R. O. M. Date: 12-17-02
Deadline: 12-26-02

MEMORANDUM

TO: The Commission

FROM: John D. Albers, Administrative Law Judge

DATE: December 10, 2002

SUBJECT: Santanna Natural Gas Corporation
d/b/a Santanna Energy Services

Application for Certificate of Service Authority under Section 19-110 of the Public Utilities Act.

RECOMMENDATION: None

On November 7, 2002, the Commission entered an Order granting Santanna Natural Gas Corporation d/b/a Santanna Energy Services ("Santanna") a certificate of service authority authorizing Santanna to operate as an alternative gas supplier under Article 19 of the Act. The Illinois Attorney General, on December 6, 2002, and Citizens Utility Board ("CUB"), on December 9, 2002, each filed an Application for Rehearing. The deadlines for Commission action on the Applications for Rehearing are December 26 and 29, respectively. The arguments of the AG and CUB are summarized separately below.

The AG's Application for Rehearing

The AG makes several arguments in support of its Application for Rehearing. First among them is that the Commission's conclusion that Santanna was compliant with all applicable laws and rules by the end of the grace period is unsupported by analysis or evidence and therefore in violation of the Act. Specifically, the AG continues to maintain that Santanna's marketing materials violate Section 19-115 of the Act. According to the AG, the Order does not address these arguments or resolve the conflicting points of view expressed in the record. Because of the lack of analysis, discussion, or resolution of the issues presented, the AG insists that the Commission's finding that Santanna qualifies for certification is subject to remand for failing to meet the statutory requirements of Section 10-201(e)(iii) which requires substantive analysis, not mere conclusions. Furthermore, because the AG believes that substantial evidence in the record actually supports denial of a certificate, the AG concludes that the Order is subject to reversal by an appellate court pursuant to Section 10-201(e)(iv)(A) of the Act.

The AG also asserts that it presented evidence that Santanna's marketing materials, as of the end of the grace period, were in violation of the Illinois Consumer Fraud Act, 815 ILCS 505/1. In particular, the AG states that Santanna's most recent materials in the record do not meet the "least educated consumer standard" used to evaluate whether, under the Consumer Fraud Act, those materials are likely to deceive a consumer. Because the Order failed, according to the AG, to provide sufficient legal analysis of, or even address, the AG's Consumer Fraud Act arguments, the Order is subject to remand or reversal.

The finding that Santanna is in compliance with applicable laws and rules also conflicts with Santanna's violations of the Standards of Conduct provisions set forth in the Customer Select and Choices for You tariffs, according to the AG. The Standards of Conduct, the AG avers, require the marketing materials of alternative gas suppliers to adequately disclose all prices, terms, and conditions, and adhere to any truth in advertising laws. The AG asserts that the record shows that Santanna's marketing materials have never met these standards and continue to be deficient. Under the tariffs, the AG argues that Santanna's failure to comply with the Standards of Conduct disqualifies the company from certification. Moreover, because utility tariffs have the force and effect of law, the AG maintains that the Commission's failure to enforce them is reviewable by an appellate court and in this instance the Commission's Order is apt to be reversed under Section 10-201(e)(iv)(C) of the Act.

In addition to taking issue with the finding that Santanna was in compliance with applicable laws and rules, the AG objects to the Commission's finding that forcing customers to switch providers, by denying Santanna a certificate, at the beginning of the winter season will deprive customers of the benefits of gas storage. The AG argues that the Order provides no legally sufficient analysis to support this conclusion.

The AG also contends that the conditions in the Order will not ensure that Santanna's earlier actions are not repeated. While the Order outlines several reporting requirements, the AG laments that the reporting requirements provide no direction on how to enforce any changes that the reported information reveal as necessary. The requirement that complaints be reported to the Commission is also too vague, according to the AG. Throughout the docket, the AG states, Santanna referred to complaints as "customer inquiries" or "consumer allegations." Employing this terminology, the AG fears that Santanna will be able to avoid including such "inquiries" and "allegations" in the reports required under Paragraph 93 of the Order. The AG asserts that Santanna's certification that it will comply with the conditions is also suspect. In its application for a certificate, the AG notes that Santanna certified that it would comply with all applicable laws, yet evidence was introduced that Santanna was not in compliance with applicable laws. The absence of any discussion in the Order of the value of Santanna's certifications leads the AG to conclude that the Order is deficient and risks being remanded or reserved.

The AG takes issue with language in the Order regarding the "renewal" of Santanna's certificate as well. Paragraph 96 of the Order states, "Continuance of these

conditions will be reassessed upon application for renewal of the AGS certificate.” Article 19, the AG observes, contains no provision for renewal of a certificate. Section 19-120 sets out the Commission’s oversight authority for certified alternative gas suppliers. Section 19-120(c) details specific procedures and instances for review of certification of alternative gas suppliers. The AG states that these sections do not contemplate any routine certificate renewal proceeding. Consequently, to the extent that the Commission’s determination is based on review of compliance during a certificate renewal proceeding, this determination is subject to remand under Section 10-201(e)(iv)(C) for violating state law by reading a renewal provision into Article 19 where none exists.

CUB’s Application for Rehearing

In support of its Application for Rehearing, CUB argues that the Commission’s Order is insufficient to ensure Santanna’s compliance with state and federal law. The remedial action plan condition, CUB argues, neglects to consider Santanna’s repeated unwillingness to take responsibility for its actions. To rely on Santanna’s own self-assessment in a remedial action plan to determine how to avoid repeating its previous practices is in error, according to CUB. Not only does the Order fail to clearly define the content of the remedial action plan, CUB states further that it appears to fail to address the implementation of the remedial action plan. CUB maintains that following Santanna’s remedial action plan, particularly when Santanna has demonstrated a lack of familiarity with or willingness to obey the law, is akin to permitting Santanna to regulate itself.

With regard to the conditions pertaining to reporting requirements, CUB observes that not one of the requirements carries a provision for enacting a penalty or remedy in the event that a condition is not met. The Order also fails, according to CUB, to describe exactly how any of the conditions will prevent Santanna from once again violating the very laws the Commission concedes that Santanna has disobeyed. For instance, CUB notes that not one of the conditions pertains to door-to-door sales or verification of telephone sales—the primary sources of complaints received by the Commission, the AG, and CUB.

The statement in the Order that the conditions will be reassessed when Santanna applies for renewal of its certificate also troubles CUB. For one thing, there is no provision in the Order requiring Santanna to seek a renewal. More importantly, CUB asserts that there is no provision in Article 19 that requires any alternative gas supplier to seek renewal of its certificate. Once a certificate is granted, CUB states that the Commission can only alter, revoke, amend, or modify the certificate after notice and hearing prompted either by a complaint or the Commission’s own motion. Therefore, CUB fears that the Order does not contain a viable option for assessing Santanna’s compliance or punishing non-compliance with the terms contained therein.

CUB states further that the Commission improperly shifts its regulatory responsibility to CUB and the AG when the Order “urges the parties to use Docket No.

02-0425 to pursue remedial actions for Santanna's inappropriate business practices." (Order at Para. 92) CUB claims that this implies that it and the AG should essentially re-litigate their positions in this case in another docket pending before the Commission. CUB finds this untenable. Absent its complaint, CUB notes that there would be no docket through which to penalize Santanna's behavior in the market to date. Moreover, CUB asserts that the Commission should not suggest that another entity perform functions that the Commission itself is legally mandated to do. While it and the AG are public advocates, CUB insists that they can not and should not be forced to pursue or undertake actions that are essentially duplicative of earlier actions taken before the Commission.

The final issue on which CUB seeks rehearing concerns the Commission's finding that forcing customers to switch providers, by denying Santanna a certificate, at the beginning of the winter season will deprive customers of the benefits of gas storage. CUB argues that this statement is wholly unsupported by the record because no evidence exists on this issue in the record. CUB argues that any consideration of these issues and a judgment thereupon were made outside the scope of the body of evidence before the Commission and is therefore impermissible under Section 10-103 of the Act and constitutes reversible error under Section 10-201(e).

JDA